

IMMUNITY OF RATE ASSOCIATION AGREEMENTS FROM THE ANTITRUST LAWS: REQUIREMENTS OF THE "CARRIERS' RATE BUREAU ACT OF 1948"

HISTORY¹

Perhaps the first Rate Association to be formed was the Trans-Missouri Freight Association, organized in 1889 and comprising many of the railroads operating west of the Mississippi River. The purposes of this Association were announced in its preamble,² which provided:

For the purpose of mutual protection by establishing and maintaining reasonable rates, rules, and regulations on all freight traffic both through and local, the subscribers do hereby form an association to be known as the Trans-Missouri Freight Association, and agree to be governed by the following provisions . . .

Under this agreement rates were established and enforced against all members party thereto. In 1892 action was brought against the Association under the recently enacted Sherman Act, alleging the agreement was a contract in restraint of trade. In answer to the defense that railroads are under the exclusive jurisdiction of the Interstate Commerce Commission and that only contracts which unreasonably restrain trade are declared illegal by the Sherman Act, the Supreme Court held that railroads are subject to the prohibitions of the Sherman Act and that all contracts in restraint of trade are illegal, not merely those imposing unreasonable restraints.

The next attempt to organize an effective rate association was in 1896 when the Joint Traffic Association composed of railroads operating between Chicago and the eastern seaboard was formed. Following their previous decision in the Trans-Missouri case the Supreme Court perpetually enjoined the operation of the association.³ This decision curtailed any further effort to openly fix rates by a rate conference until the 1930's, although many other devices in the nature of trade association were employed to carry out joint activities.⁴ In the 1930's more

¹ It is not intended that this discussion be an exhaustive treatment of the history of rate associations, but merely an outlining of the basic steps leading to the enactment of the Carriers' Rate Bureau Act of 1948, also known as the Reed-Bulwinkle Act, (49 U.S.C.A. 5b). For a complete account of the history of the rate making process prior to 1948 see Berge, *Rate Making Process*, 12 LAW & CONTEMP. PROB. 449, from which this short account is taken.

² The entire preamble and by-laws of the Trans-Missouri Freight Association may be found set out in *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 292.

³ *United States v. Joint Traffic Association*, 171 U.S. 505 (1898).

⁴ Berge, *supra* note 1 at 450 *et seq.* containing a thorough discussion of the associations employed.

vigorous attempts were made to accomplish the joint consideration of rates,⁵ but in view of the early decisions in the Trans-Missouri and Joint Traffic cases, these agreements would be subject to the Sherman Act and their legal status therefore in doubt. As recently as 1945 in *Georgia v. The Pennsylvania Railroad Co.*, the Supreme Court held that rate-fixing combinations were not immune from the operation of the antitrust laws.⁶ In spite of the uncertainty of their legality active rate associations have continued to exist openly, and their existence has been recognized by shippers, and governmental agencies alike.⁷

In 1948 there was enacted the "Carriers Rate Bureau Act of 1948"⁸ which granted rate associations immunity from the antitrust laws subject to certain requirements, thus providing ascertainable legality for many existing rates.

REASONS FOR THE ACT

The enactment of this legislation was generally in fulfillment of the desires of carriers, the Interstate Commerce Commission,⁹ and shippers¹⁰ alike. It is not the purpose here to debate at length the merits of the law,¹¹ but merely to outline the reasons generally advanced for its enactment.

Principally, it is urged that in order to comply with the letter and spirit of the National Transportation Policy¹² it is necessary for carriers to engage in joint consideration of traffic matters.¹³

The carriers cannot effectively meet the requirements of the law [Interstate Commerce Act], or provide the type of transportation that the public has come to expect and demand of them, if each is to be compelled to go it alone without a reasonable degree of consultation and agreement with other carriers.¹⁴

Specifically, those two requirements of the Interstate Commerce Act

⁵ For example the formulation of the Western Agreement in 1932 and the Formation of the American Association of Railroads in 1934.

⁶ *Georgia v. Pennsylvania RR. Co.*, 324 U.S. 439, 456 (1945).

⁷ U. S. Code and Congressional Service, 80th Congress, Second Session 1948—H.R. No. 1100, page 1845 *et seq.*

⁸ 49 U.S.C. §5b, also known as the Reed-Bulwinkle Act.

⁹ U. S. Code and Congressional Service, *supra* note 7, at page 1849.

¹⁰ See for example the position taken by intervening shipping interests in Western Traffic Association—Agreement: §5a Application No. 2, 276 I.C.C. 183, 203 *et seq.* The bureau method of rate making was supported by intervening shippers in almost all other section 5a applications.

¹¹ Berge, *supra* note 1, contains a criticism of the then proposed Reed-Bulwinkle Act.

¹² Note before §1 of the Interstate Commerce Act.

¹³ For a complete development of this concept see Dickenson, *Rate Conferences in the Railroad Industry under The Sherman Act and the Act to Regulate Commerce*, 12 LAW & CONTEMP. PROB. 470, 479 *et seq.*

¹⁴ U. S. Code and Congressional Service, *supra* note 7 at page 1850.

which it is urged command that provision for the joint consideration of traffic matters be made are first those requirements which place a maximum of "reasonableness" on rates and at the same time provide that rates shall not fall below a level sufficient to maintain an adequate transportation system; and second those requirements which place upon carriers the responsibility of providing for through routes and joint rates and an equitable division of the revenues thereof.¹⁵

The first of those reasons above merely states that transportation rates cannot be made subject to competitive practices enforced in other industries, for by its very nature competition would be ruinous to an adequate and efficient transportation system.

Under free competition, prices must, and will at times, rise to levels of very high profits in order to counterbalance other periods of depressed prices, which have the effect of causing marginal producers to close down operations, if not actually go out of business . . .

* * *

. . . The object of the Interstate Commerce Act is to protect the national transportation plant for the service of the public and preserve its component railroads as going concerns. To this end the standard of rate reasonableness provided by the Act excludes not only those rate reductions which would cause the rails of necessary transportation lines to be torn up, but also those which would make it difficult or impossible to obtain additional increments of needed capital.¹⁶

The second of those reasons above recognizes in the Interstate Commerce Act the concept of an integrated national transportation system.

Today it is recognized that the railroads of the country together form a single transportation system. Joint operations are on the whole of more importance than local operations. Trains or cars move freely from one railroad to another, and through routes and joint rates exist in multitudinous quantity. However, the single system is still made up of a large number of parts which are separately owned and managed . . .¹⁷

In testimony to the importance to the transportation system of interline traffic are the facts recited in *Eastern Railroads—Agreements*,¹⁸ which point out the following percentages of interline traffic in official territory for the respective carriers: "75 percent for the Erie, 76 percent for the Baltimore and Ohio, 82 percent for the New York

¹⁵ 49 U.S.C. §1(4).

¹⁶ Dickenson, *supra* note 13, at 479. It should be remembered here that by the provisions of the Interstate Commerce Act, railroads are not permitted to abandon service without first acquiring a certificate of public convenience and necessity from the Interstate Commerce Commission. 49 U.S.C.A. §1(18).

¹⁷ The Honorable Joseph B. Eastman, in First Report of the Coordinator of Transportation, Sen. Doc. No. 119, 73rd Cong., 2d Sess. 8 (1934).

¹⁸ *Eastern Railroads—Agreements*: §5a, Application No. 3, 277 I.C.C. 279, 283.

Central, 68 percent for the Pennsylvania, 93 percent for the Boston & Maine, and 87 percent for the Maine Central". By these facts it is urged that carriers cannot possibly carry out their obligations to provide joint and through rates and routes without an effective and permissible method of joint consideration of the traffic matters involved.

Thus it is seen that enactment of the Carriers' Rate Bureau Act of 1948 was predicated on the belief that furtherance of the National Transportation Policy will result through elimination of destructive competition and the necessity of complex interline operations.

REQUIREMENTS FOR IMMUNITY

By providing immunity from the antitrust laws for agreements for the joint consideration and establishment of rates Congress has not given plenary powers of collusive rate making to the common carriers comprising the national transportation system, rather it has included in its grant of immunity from the antitrust laws certain requirements which must be met before the benefits of immunity attach. The Interstate Commerce Commission has been given the task of approving any agreement submitted to it provided the agreement meets the requirements of the Act and is not of a prohibited type.

AGREEMENTS BETWEEN CARRIERS OF DIFFERENT CLASSES AND POOLING AGREEMENTS

By paragraph (4) of the Carriers' Rate Bureau Act the Commission is forbidden to approve any agreement for joint consideration of rates between or among carriers of different classes unless it finds that such agreement is limited to matters relating to transportation under joint rates or over through routes.¹⁹ Generally, a class of carrier is defined by mode of transportation, *i.e.*; railroads, motor carriers, water carriers are each a separate class. It would seem obvious that the reason for this provision is to maintain the essential competition between modes of transportation in order to preserve the inherent advantages of each, as declared by the National Transportation Policy.

Paragraph (5) forbids the Commission to approve, under this Act, any agreement it finds to be a pooling agreement to which section 5 of the Interstate Commerce Act applies. Section 5 deals with certain provisions and requirements for the pooling of equipment and facilities among carriers. The object here is to insure that no carriers seek immunity from the antitrust laws under this section, for agreements which should be subject to the requirements and obligations of another section of the Interstate Commerce Act.

¹⁹ Application was refused in *New England Motor Rate Bureau, Inc.—Agreement*: §5a Application No. 25, 287 I.C.C. 9 at pages 14 and 15 for including carriers of different classes. See *Railroad Interterritorial Agreement*, 287 I.C.C. 701 at 705 for an instance of proper participation of carriers of different classes.

FURTHERANCE OF THE NATIONAL TRANSPORTATION POLICY

It is obvious that not every agreement providing procedures for the joint consideration of rates must be approved by the Commission. The Commission is authorized to approve only those which it finds are in furtherance of the National Transportation Policy. While admitting the desirability of procedures for joint rate making, and the benefits occasioned thereby, the procedures for which immunity is sought must evidence a bona fide attempt to prescribe a method of rate making which will fulfill the purpose of the Interstate Commerce Act. In referring to the necessity that an agreement be in furtherance of the National Transportation Policy the Commission has said,

Those parts of the policy . . . most directly pertinent here call for the promotion of 'adequate economical and efficient service', for the fostering of 'sound economic conditions in transportation,' and for encouraging the establishment and maintenance of 'reasonable charges for transportation services, without unjust discrimination, undue preferences, or advantages, or unfair or destructive competitive practices.'²⁰

It is the belief of the Commission that an agreement among carriers to join in collusive rate making without more, does not sufficiently fulfill the spirit of the National Transportation Policy and is precisely the type of agreement directed to be rejected by the Carriers' Rate Bureau Act. The Commission has exercised its authority under the Act to insure that only those agreements setting out procedures for a fair and equitable determination of rates and charges will be approved. The Commission insists that an agreement to be in furtherance of the National Transportation Policy must provide for a procedure consisting of clearly defined steps in a rate making process, including participation of all carriers in the area, and participation by all other interested parties including shippers.

Rate Making Process

The Commission has declined approval of any agreement which does not provide clearly defined steps in the processing of a rate proposal on the grounds that it is not in furtherance of the National Transportation Policy. Generally, the plan of procedure must provide for a committee or group to decide upon any rate proposal. Provision must be made for a method of submission of proposals to the rate committee and a procedure of hearings and methods of disposition of the proposals by the committee. Methods of voting and a plan of submission of the issue to the Bureau membership must be specified in detail as a part of the agreement.²¹ Any agreement which provides merely for the joint consideration of rates without specified procedures will be denied ap-

²⁰ Western Traffic Association—Agreement, *supra*, note 10 at 211.

²¹ This is the type of plan of which the Commission announced its approval in Western Traffic Association—Agreement, *ibid*.

proval.²² Likewise an agreement to join together in a trade association for the purpose of taking advantage of the benefits of group participation in joint advertising, insurance protection, cost studies, and other trade association activities is not the type of agreement entitled to anti-trust law immunity under the Carriers Rate Bureau Act.²³

Carrier Participation

The Commission has insisted that all carriers of the class participating in an agreement submitted for approval, and doing business in the geographical area covered by the agreement must be allowed to become a party to that agreement. Agreements have been approved only on condition that they be amended to permit such participation.²⁴ The purpose of this requirement would seem to be to avoid the possibility of collusive rate making for the purpose of excluding a competitor from the market. By requiring that all carriers desiring to become members be so permitted it becomes impossible for members through collusive action to price a non-member out of the market. This right to participation may be conditioned only upon the payment of reasonable dues.²⁵ Any agreement approved by the commission must provide for a method of submitting proposals to the rate committee by the member carriers. In addition each member must be notified of the existence of a pending proposal and its nature, and be given an opportunity at a public hearing to present its views on the pending proposal.²⁶ Likewise all members must be entitled to notice of final disposition made of all matters. An opportunity to participate or abstain from participation in the committee's disposition must be allowed.²⁷

Shipper Participation

In recognition of the public nature of the transportation system and as a further safeguard insuring an orderly rate making procedure the Commission has required that any interested party, particularly shippers, must be allowed to submit proposals for rate or classification changes.²⁸

In the *Western Traffic Association Agreement*;²⁹ Section 5a Application

²² Applications were denied in Independent Movers' and Warehouseman's Association, Inc.—Agreement, 286 I.C.C. 651, 653-654 and Wearing Apparel Carriers—Agreement, 288 I.C.C. 486, 487 for failure to provide definite procedures. But contrast Mississippi Valley Motor Freight Bureau, Inc.—Agreement, 294 I.C.C. 791, 795 wherein it was held express procedures were not required.

²³ Michiana Motor Carriers' Conference, Inc.—Agreement, 288 I.C.C. 327.

²⁴ Waterways Freight Bureau—Agreement, 277 I.C.C. 593, 597-598.

²⁵ Freight Forwarders Conference—Agreement, 298 I.C.C. 229, 11 Federal Carriers Cases 616, 618.

²⁶ Wearing Apparel Carriers—Agreement, *supra* note 22 at 487.

²⁷ This matter will be considered at greater length in the discussion on the right to take independent action.

²⁸ Interstate Freight Carriers' Conference, Inc.—Agreement, 293 I.C.C. 47, 50.

²⁹ Western Traffic Association Agreement: §5a, Application No. 2, 276 I.C.C. 183.

No. 2, 276 I.C.C. 183, shippers intervening in support of the application stated their desires in regard to their right to participation in the rate making process as three fold: 1. adequate notice of proposed changes in rates and classifications; 2. a public hearing granted by the rate making officers before which interested parties may appear to present their views; and 3. notice of disposition of all matters decided by the association. Generally, the Commission has, in every application, required these elements to be included as part of the agreement as a condition for approval. However, not every matter to be considered by the particular rate bureau need be announced in advance to shippers. Only those matters in which shippers have a direct interest need be brought to their attention. Thus it is not required that shippers be notified of proposals regarding per diem and mileage charges.³⁰ Likewise the type of notice required is not the same in every case. Notice by mail is usually provided for those shippers who have announced their interest to the bureaus and in addition the Commission usually requires notice by publication in a national traffic journal.³¹ However, if notice by publication is not required due to the limited territory involved, notice by mail may be sufficient.³²

Shippers are not limited in their participation to an appearance at hearings, but may file briefs or if they wish, submit written memoranda of their position without physical appearance.³³ In addition to the right to appear at hearings, if a method of appeal to an executive committee or board of directors, from adverse decisions of the rate committee, is provided for by the agreement, that right must be extended shippers as well as to member carriers.³⁴ However, if a shipper has once appeared and presented his position or proposition to a rate committee it is not required that he be allowed to appear again before the higher body.³⁵ This would seem to indicate that although shippers have a right to participate in the rate making process, the primary responsibility for rate making rests upon carrier management, *i.e.*; rate making is recognized as a management function. Once the shipper has stated his position his rights before the bureau end and the duty is upon management to make the decision.

Notice of disposition of all matters before a bureau is also required as a condition for approval,³⁶ though the extent of notice is relative to the same degree as for notice of proposals. However, the Commission has required advance notice of the intent to allow expiration of those

³⁰ Association of American Railroads, Per Diem, Mileage, Demurrage, and Storage—Agreement, 277 I.C.C. 413, 418.

³¹ Interstate Freight Carriers' Conference, Inc.—Agreement, *supra* note 28, at page 49.

³² New England Motor Rate Bureau, Inc.—Agreement, 288 I.C.C. 450.

³³ Southern Illinois Motor Rate Conference—Agreement, 288 I.C.C. 443, 448.

³⁴ Middlewest Motor Freight Bureau—Agreement, 297 I.C.C. 659, 11 Federal Carriers Cases 524, 525.

³⁵ Middle Atlantic Conference—Agreement, 283 I.C.C. 683, 688.

³⁶ Association of American Railroads—Agreement, *supra* note 30, at 426.

rates which when first established bore future dates of expiration.³⁷

It is not sufficient that the foregoing requirements be merely implicit in the terms of the agreement. Running throughout the Commission's deliberations on applications for approval of rate agreements is the insistence that the various provisions regarding notice, hearing, and appeal be expressly included in the agreements and precise as to procedure.³⁸

RIGHT TO TAKE INDEPENDENT ACTION

In compliance with paragraph (6) of the Carriers' Rate Bureau Act the Commission requires as a condition for approval that any carrier party to a rate agreement be accorded by the agreement the unrestrained right to take independent action in respect to rate making, either before or after determination arrived at through the procedure prescribed. The Commission has not considered it sufficient that the right be merely implied in the agreement or exist by virtue of practice alone, but insists that a provision providing the right be made an express part of the agreement.³⁹ The Commission considers that a sufficient right to independent action exists only when, in addition to the prescribed process of rate making, there exists in the agreement two other methods of rate formulation: 1. by independent action on the part of a carrier, without reference to agreement procedure; and 2. by independent action taken by a carrier before disposition of his proposal has been made by the rate committee or after an adverse decision of his proposal has been made.⁴⁰

The Commission has had occasion to pass upon many provisions, contained in rate agreements, which either allegedly or actually were included in an attempt to place limitations upon the right to take independent action. Perhaps most frequent has been the provision for notice to the association before the independent rate may become effective (usually 10 to 20 days notice is specified). This limitation has not been considered objectionable by the Commission,⁴¹ since the right to take independent action is not considered a device to permit individual carriers to take advantage of temporary conditions by price-cutting action, but was designed to permit freedom of action without dictation by majority influence. Thus it is reasonable for a carrier desiring to take independent action to first notify other members who may wish to concur in his action, thereby preserving freedom of action while at the same time eliminating dangerous competitive practices and a last minute rush to cut rates.⁴²

³⁷ Western Traffic Association—Agreement, *supra* note 10, at 217.

³⁸ Freight Forwarders Conference—Agreement, *supra* note 25.

³⁹ Independent Movers' & Warehousemen's Association, Inc.—Agreement, 277 I.C.C. 229, 232.

⁴⁰ Western Traffic Association—Agreement contains an approval of the practice of providing alternative methods of rate formulation, *supra* note 10, at page 210.

⁴¹ Western Traffic Association—Agreement at page 197.

⁴² Inland Water Carriers' Freight Association—Agreement, 278 I.C.C. 756, 759.

The right to take independent action may not be limited to either the time before or the time after a rate determination by a rate making committee, but must be permitted before, during, and after consideration of any proposal by an association.⁴³ Thus a provision allowing independent action only before and after bureau consideration under its rate procedure renders the agreement impossible of approval.⁴⁴ Likewise a limitation requiring prior submission of a proposal to bureau procedure before individual action may be taken is not permissible.⁴⁵

Since it is not necessary to first place a proposal in bureau procedure before taking independent action in regard to it, the right to take independent action must not be limited to the proponent of a rate proposal, but must extend to any carrier desiring to concur in the independently set rate.⁴⁶ Any provision to the contrary must be deleted from the agreement.

Many seemingly innocent provisions have been attacked by the Commission as creating a possible limitation on the right to freedom of action. In this category are provisions requiring members to have their rates published by bureau only,⁴⁷ by requiring that independently set rates be published at the carrier's own expense,⁴⁸ or by another publishing agent.⁴⁹ All provisions of this nature must be excluded from an agreement in order to gain Commission approval since their application may result in a restraint upon independent action. Other seemingly innocent provisions are those providing for expulsion from membership of any carrier not complying with the terms of the agreement. Without exception the Commission has insisted upon deletion of such provisions⁵⁰ due to the possibility of their use as a device to restrain independent action. Further the Commission has allowed failure to pay dues as the only grounds for expulsion from membership.⁵¹

Many agreements submitted to the Commission for approval have contained provisions authorizing the bureau formed by the agreement to represent the membership before the Commission in seeking suspension

⁴³ Central States Motor Freight Bureau, Inc.—Agreement, 278 I.C.C. 581. The Commission held that by the use of the phrase "before or after" bureau determination in paragraph (6) of the act, Congress did not use "or" in its disjunctive sense.

⁴⁴ Columbia River Tariff Bureau—Agreement, 284 I.C.C. 436, 439-440.

⁴⁵ National Motor Freight Traffic—Agreement, 292 I.C.C. 45, 49.

⁴⁶ Interstate Freight Carriers' Conference, Inc.—Agreement, *supra* note 28 at page 52.

⁴⁷ Central States Motor Common Carriers—Agreement, 289 I.C.C. 517, 523-524.

⁴⁸ Niagara Frontier Tariff Bureau, Inc.—Agreement, 294 I.C.C. 541, 546-547, 546-547.

⁴⁹ Rocky Mountain Motor Tariff Bureau, Inc.—Agreement, 293 I.C.C. 585, 594-595.

⁵⁰ Southwestern Motor Freight Bureau, Inc.—Agreement, 294 I.C.C. 247, 256-257,

⁵¹ *Supra* note 24.

of rates set by independent action, under the provisions of the Interstate Commerce Act providing for procedures for the suspension of rates. These provisions have been uniformly attacked by interveners as a limitation upon the right of independent action. Some have suggested that provision should be made in all agreements expressly forbidding the bureaus thus created from seeking suspension of the rates of its members. The Commission, however, has refused to require that as a condition of approval, pointing out that under section 216 (e) and (g) of the Interstate Commerce Act all interested parties are given the right to seek a rate suspension. This would include rate bureaus.⁵² However, the Commission felt that a provision authorizing a bureau to seek suspension of a member's rate was not a matter concerning the joint consideration of rates and therefore not properly includable as a part of a rate association agreement.⁵³

Criticism has been directed at the bureau techniques of requiring notice of the decision to take independent action and the practice of providing a system of appeals within the bureau for proposals not accepted by a lower rate committee. The objection to these practices is that they tend to be delaying tactics designed to discourage independence of action.⁵⁴ It has been contended that these tactics tend to give the stronger members of the bureau an opportunity to coerce members desiring to take independent action into complying with bureau procedure. Advance notice of independent action has been dealt with above. In answer to the criticism leveled at the appeal procedures it may be said that independent action may be taken by a proponent carrier at any stage of the procedure, and that appeals to higher bureau authority are provided for those cases wherein it would be a disadvantage to a proponent carrier to take independent action. In the case of a proposed rate increase, for example, it would be folly for a carrier to undertake independent action if the rate would be in competition with a lower bureau rate. Thus in those cases the provision for appeal increases a proponent carrier's opportunity to achieve group action. In cases of rate decreases it is expected that a carrier will take independent action without availing itself of the appeal procedure, or in fact without reference to bureau procedure in any way. As an ultimate right to take independent action, the Commission has required that any carrier party to an agreement must be free to withdraw from membership from the bureau when it so desires.⁵⁵

THE NATURE OF THE IMMUNITY

Paragraph (9) of the Carriers' Rate Bureau Act provides immunity from antitrust law prosecution for parties to any agreement

⁵² Middle Atlantic Conference—Agreement, *supra* note 35 at 688-690.

⁵³ *Ibid.*

⁵⁴ See the position of intervening shipping interests and the Department of Justice in Western Freight Association—Agreement, *supra* note 10.

⁵⁵ Lake Coal Demurrage Committee—Agreement, 279 I.C.C. 40, 41.

approved by the Commission, with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission. Thus relief is granted only to the extent that the parties actually carry out the terms of their agreement as conditioned by the Commission. Many of the agreements approved by the Commission have received criticism to the effect that even though the express terms of the agreement comply with the requirements of the Act and the conditions of the Commission, in reality the agreement is little more than a front for domination of the industry by strong minority carriers.⁵⁶ The Commission has answered this criticism, however, by pointing out that the Act provides immunity only to the extent that the agreements are carried out in conformity with their terms as conditioned by the Commission. Thus, should action taken by a rate association be enforced upon its members by coercion or threats of coercive activity by industry leaders, that action would be subject to anti-trust law prosecution as being not in conformity with the terms of the association's agreement and the Commission's conditions for approval.

The same answer may be made to criticism of provisions of some agreements which provide procedures for the amendment of such agreements.⁵⁷ The Commission points out that provisions for amendment are not objectionable in themselves, since before immunity from the antitrust laws may be invoked in favor of any action taken under an amendment to the original agreement, that amendment must first be approved by the Commission. Otherwise, immunity will extend only to action taken in conformity with the original agreement.

CONCLUSION

The precise extent and exact nature of the immunity from anti-trust law prosecution provided for joint rate making agreements has in fact never been determined, since no case involving the application of the Carriers' Rate Bureau Act has yet been before the courts. It seems certain, however, that any possible liability imposed upon the parties to these agreements would be predicated either upon the parties' failure to comply with terms of their agreement and conditions imposed by the Commission, or upon the Commission's failure to require, as a condition to approval, terms sufficient, in the view of the court, to carry out the spirit of the Act. The rate bureau method of rate making has been sanctioned. The Commission has required as a prerequisite to use of this method a procedure designed to safeguard member carriers from abuses of strong competitors, and the public and shippers from the

⁵⁶ See the position of the Department of Justice in *Western Traffic Association—Agreement*, *supra*; *National Bus Traffic Association, Inc. (Rate and Tariff Procedure)—Agreement*, 278 I.C.C. 147; and *Eastern Railroads—Agreements*, 277 I.C.C. 279.

⁵⁷ *National Bus Traffic Association, Inc.—Agreements*, *id.* at 155.

abuses of collusive rate making. The former has been effectuated through requirement of a right to take independent action, and the latter by shipper participation in the rate making process. Whether the Commission has gone sufficiently far in their requirements has yet to be tested by the courts.

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APPENDIX A

Carriers' Rate Bureau Act of 1948

Section 5b . . . (2) Any carrier party to an agreement between or among two or more carriers relating to rates, fares, classifications, divisions, allowances, or charges or procedures for the joint consideration, initiation or establishment thereof, may, under such rules and regulations as the Commission may prescribe, apply to the Commission for approval of the agreement, and the Commission shall by order approve any such agreement (if approval thereof is not prohibited by paragraph (4), (5), or (6) of this section) if it finds that, by reason of furtherance of the national transportation policy declared in this Act, the relief provided in paragraph (9) should apply with respect to the making and carrying out of such agreement; otherwise the application shall be denied. The approval of the Commission shall be granted only upon such terms and conditions as the Commission may prescribe as necessary to enable it to grant its approval in accordance with the standard above set forth in this paragraph.

(3) . . .

(4) The Commission shall not approve under this section any agreement between or among carriers of different classes unless it finds that such agreement is of the character described in paragraph (2) of this section and is limited to matters relating to transportation under joint rates or over through routes; and for purposes of this paragraph carriers by railroad, express companies, and sleeping-car companies are carriers of one class; pipe-line companies are carriers of one class; carriers by motor vehicle are carriers of one class; carriers by water are carriers of one class; and freight forwarders are carriers of one class.

(5) The Commission shall not approve under this section any agreement which it finds is an agreement with respect to a pooling, division, or other matter or transaction, to which section 5 of this Act is applicable.

(6) The Commission shall not approve under this section any agreement which establishes a procedure for the determination of any matter through joint consideration unless it finds that under the agreement there is accorded to each party the free and unrestrained right to take independent action either before or after any determination arrived at through such procedure . . .

(9) Parties to any agreement approved by the Commission under this section and other persons are hereby relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its

provisions and in conformity with the terms and conditions prescribed by the Commission.

APPENDIX B

The National Transportation Policy

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.